

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF PUBLIC SAFETY
Driver and Vehicle Services Division

In the Matter of the Proposed Permanent
Rules Relating to Driver Education
Schools and Programs, Minnesota Rules
Chapter 7411.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Beverly Jones Heydinger conducted a hearing regarding the above rules beginning at 9:00 a.m. on October 28, 2003, in Room 200 of the State Office Building, 100 Rev. Dr. Martin Luther King, Jr. Blvd., St. Paul, Minnesota 55155. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act^{[\[1\]](#)} before an agency can adopt rules. The legislature has designed this process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications of the rules made after their initial publication do not result in rules that are substantially different from those originally proposed.

The rulemaking process also includes a hearing when the rules are controversial or when an agency receives 25 or more requests for a hearing. The hearing is intended to allow the agency and the Administrative Law Judge (ALJ) reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The ALJ is employed by the Office of Administrative Hearings, an agency independent of the Department of Public Safety (Department).

Deborah Carlson, Exam Services Coordinator; Jim Connolly, Manager of Driver License Exam and Issuing; Don Hoechst, Driver Education Coordinator; Cindy Hom, Exam and Issuing Assistant; and Jane A. Nelson, Rules Coordinator, Driver and Vehicle Services Division, Minnesota Department of Public Safety, 445 Minnesota Street, St. Paul, MN 55101, presented the Department's position and answered questions at the hearing. Approximately 25 persons attended the hearing and 24 signed the hearing register. Ten people spoke at the hearing.

Several public comments were submitted before the hearing. After the hearing ended, the Administrative Law Judge kept the record open for 20 calendar days until November 17, 2003, to allow interested persons and the Department an opportunity to submit written comments. During this initial comment period the ALJ received written comments from the Department and 15 public comments. Following the initial comment period, the Administrative Procedure Act requires that the hearing record remain open for another five business days to allow interested parties and the agency to respond to any written comments. The agency and several members of the public filed a response. The hearing record closed for all purposes on November 24, 2003.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 29, 2001, the Department published a Request for Comments on Planned Changes to Minnesota Rules, Chapter 7411 Governing Driver Education Programs, Driver Improvement Clinics and Accident Prevention Courses in the *State Register*.^[2] The request indicated that the Department was considering changing existing rules to address specific issues, such as the use and definition of driver education simulation; classroom laboratory and range driving hours; instructor qualifications and disqualification; teleconferenced and on-line classroom instruction; and an increase in the surety bond, among other issues. The Request for Comments was published at 26 *State Register* 579.^[3]

2. A second Request for Comments was published on August 19, 2002 to address legislation requiring that the issue of organ donation be addressed in driver education programs.^[4] The second Request for Comments was published at 27 *State Register* 269.^[5]

3. The Department mailed notice of the Requests for Comments to: its rulemaking mailing list; all appointed department licensing agents, all driver license and identification card application and examination sites, and all deputy registrar offices, with a request to post the notice in an area accessible to the public; all county sheriffs and the Minnesota Chiefs of Police Association with a request to convey the information to their members; legislators; an additional mailing list with particular interest in these rules; all Department-licensed commercial driver education schools; and all public and private driver education programs in the state.^[6] The Department also placed the Requests for Comments on its website.^[7]

4. By a letter dated August 26, 2003, the Department requested that the Office of Administrative Hearings schedule a rule hearing and assign an Administrative Law Judge. The Department also filed a proposed Dual Notice, a copy of the proposed rules and the Statement of Need and Reasonableness (SONAR).^[8]

5. In a letter dated September 2, 2003, Administrative Law Judge Beverly Jones Heydinger approved the Dual Notice.^[9]

6. On September 11, 2003, the Department mailed the Dual Notice of Intent to Adopt Rules to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all those referenced in the additional notice plan.^[10]

7. On September 11, 2003, the Department mailed the Dual Notice, proposed rules and the Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.^[11]

8. On September 11, 2003, the Department mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.^[12]

9. On September 15, 2003, the Dual Notice was published at 28 *State Register* 289.^[13]

10. On the day of the hearing the following documents were placed in the record:

- a. Request for Comments dated October 4, 2001 (Exhibit 1)
- b. Request for Comments published October 29, 2001 at 26 SR 579 (Ex. 2)
- c. Certificate of Agency Rulemaking Mailing List dated October 15, 2001 (Ex. 3)
- d. Cover letter to Minnesota Chiefs of Police Association and list of association members (Ex. 4)
- e. Letter to all drivers license agents, deputy registrars, state examination stations and customer service sites, and mailing lists dated October 24, 2001 (Ex. 5)
- f. Request for Comments as posted on Department web site on October 25, 2001 (Ex. 6)
- g. Mailing list for County Sheriffs for October 24, 2001 mailing (Ex. 7)
- h. Mailing lists for additional notice to interested parties (Ex. 8)
- i. Cover letter to legislators dated October 25, 2001 (Ex. 9)
- j. Certificate of providing notice of Request for Comments dated Oct. 30, 2001 (Ex. 10)
- k. Second Request for Comments dated August 5, 2002 (Ex. 11)
- l. Certificate of Accuracy of Agency Mailing List (Ex. 12)
- m. Request for Comments published August 19, 2002 at 27 SR 269 (Ex. 13)
- n. Mailing list of additional interested parties receiving notice of Request for Comments (Ex. 14)
- o. Statement of Need and Reasonableness (Ex. 15)
- p. Proposed Permanent Rules Relating to Driver Education Schools and Programs dated 4/14/03 (Ex. 16)

- q. Cover letter to Chief Administrative Law Judge requesting scheduling of hearing and approval of Dual Notice dated August 26, 2003 (Ex. 17)
- r. Letter from ALJ Beverly Jones Heydinger approving Dual Notice dated September 2, 2003 (Ex. 18)
- s. Letter from Department to ALJ Heydinger confirming necessity for hearing, dated October 17, 2003 (Ex. 19)
- t. Dual Notice dated September 3, 2003 (Ex. 20)
- u. Letter to Legislative Reference Library dated September 11, 2003 (Ex. 21)
- v. Letter to Legislators dated September 11, 2003 (Ex. 22)
- w. Dual Notice published September 15, 2003, at 28 SR 289 (Ex. 23)
- x. Certificate of Accuracy of the Agency Rulemaking Mailing List dated September 3, 2003 (Ex. 24)
- y. Letter to all drivers license agents, deputy registrars, state examination stations and customer service sites, and mailing lists dated September 11, 2003 (Ex. 25)
- z. Lists of all commercial, public and private driver education programs to whom the Dual Notice and proposed rules were mailed (Ex. 26)
- aa. Cover letter and lists of advisory committee and task force members to whom the Dual Notice and SONAR were mailed on September 11, 2003 (Ex. 27)
- bb. Cover letter dated September 11, 2003 to Minnesota Chiefs of Police Association and list of association members (Ex. 28)
- cc. Cover memo and list of County Sheriffs to whom the Dual Notice was mailed on September 11, 2003 (Ex. 29)
- dd. Dual Notice, proposed rules and SONAR as posted on Department web site on September 11, 2003 (Ex. 30)
- ee. News release dated September 15, 2003 and list of media organizations to whom the release was sent (Ex. 31)
- ff. Certificate of Giving Notice Pursuant to Additional Notice Plan, dated September 18, 2003 (Ex. 32)
- gg. Department Hearing Presentation (Ex. 33)
- hh. Department Exhibit List (Ex. 34)
- ii. Proposed Modifications in Response to Comments Received Prior to Hearing (Ex. 35)
- jj. Comments regarding the proposed rules received by the Department from September 25 – October 21, 2003 (Exs. 36 - 72)
- kk. Videotape submitted at hearing, Mike Polanski (Ex. 73)
- ll. Comment submitted at hearing, Association for Professional Driving Instruction (Ex. 74)
- mm. Suggested amendment to Minn. R. 7411.0275, subp. 2 submitted at hearing, William S. Collins (Ex. 75)
- nn. Comment submitted at hearing, William S. Collins (Ex. 76)
- oo. Pictures submitted at hearing, Williams S. Collins (Ex. 77)

- pp. Comment submitted at hearing, Williams S. Collins (Ex. 78)
- qq. Suggested amendment to Minn. R. 7411.0210, subp. 8 submitted at hearing, William S. Collins (Ex. 79)
- rr. Comment submitted at hearing, Jeanne Zetah (Ex. 80)
- ss. Map submitted at hearing, Professional Driving Association of Northern Minnesota (Ex. 81)
- tt. Comment submitted at hearing, Mike Polanski (Ex. 82)

Nature of the Proposed Rules

11. These proposed rules regulate public, private and commercial driver education schools and programs that provide instruction for class A, B, C and D motor vehicles, motorcycles, and motorized bicycles. The rules provide standards for the programs, including the qualifications for instructors, training and classrooms, and hours and types of instruction. The intent of the proposed rules is to provide uniform standards statewide for public, private and commercial programs.

Statutory Authority

12. The Department relies upon the following general rulemaking authority for these rules^{[\[14\]](#)}:

Minnesota Statutes § 169.26, subd. 3, concerning driver training about railroad-highway grade crossings.

Minnesota Statutes § 169.446, subd. 2, compelling the commissioner of public safety to adopt rules concerning driver instruction for the safety of children around school busses.

Minnesota Statutes § 169.974 requires the completion of an approved two-wheeled vehicle driver's safety course by persons under the age of 18 "in accordance with rules adopted by the commissioner of public safety for courses offered by a public, private, or commercial school or institute."

Minnesota Statutes § 171.02, subdivision 3 concerns the safety courses that are required to obtain a permit to ride a motorized bicycle. Paragraph (c) authorizes the commissioner to promulgate "rules prescribing the content of the safety course, examination, and the information to be contained on the permits."

Minnesota Statutes § 171.05, subdivision 2 compels persons under the age of 18 to complete driver education to obtain a class D motor vehicle driving permit.

Minnesota Statutes § 171.055, subdivision 1 provides for the issuance of provisional licenses.

Minnesota Statutes §§ 171.0701 states that the commissioner shall adopt rules concerning organ and tissue donations for persons enrolled in driver education programs.

Minnesota Statutes §§ 171.33 – 171.41 govern commercial driver training schools and require licensure of such schools by the commissioner.

13. The Department has established its general statutory authority to adopt rules in this area.

Regulatory Analysis in the SONAR

14. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness.^[15] The first factor requires:

(A) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The Department lists 27 different government units, businesses, organizations and types of individuals that will be affected by the rules.^[16] Among those listed are licensed commercial driver training school owners and licensed instructors; public, nonprofit or parochial driver education programs and instructors; professional vehicle training and safety associations; parents; and students. The list of those affected that was compiled by the Department appears to be exhaustive.

The costs and benefits of the proposed rules to each of the groups or individuals listed depends upon the affected party. The Department has summarized some of the more important costs and the related affected parties in the SONAR.^[17] The most controversial of these costs and benefits are summarized below, and are discussed more fully in the section-by-section review of the proposed rules.

Instruction by Teleconference

The Department sees only benefits in the proposed use of teleconferencing for teaching driver education. The Department states that the potential for the increased use of teleconference and on-line instruction may reduce the cost of obtaining the classroom portion of instruction and travel expenses for students and instructors. Another advantage is that a single course of instruction may be used in several locations simultaneously. This instruction option could be beneficial to students and parents.

Some of the commenters from the commercial driving schools questioned whether teleconferenced instruction of driver education was an appropriate means of instruction for teenagers. As a result of those comments, the Department proposes to amend the rules to include the requirement that an adult proctor be present in the classroom for teleconference locations that have one or more students under the age of 18.^[18]

Insurance

The Department proposes to increase the motor vehicle insurance premiums for the class D vehicle to reflect the current insurance levels carried by programs. Of the currently-regulated programs, most already insure at or above the proposed level, therefore, the Department anticipates that programs should not experience increased insurance costs.

Bond

The proposed rules increase the cost of a bond for some for-profit commercial programs. The Department estimates that programs with more than 500 students enrolled in a year would see an annual increase in bond costs of about \$200. Midsize programs ranging in size from 100 to 500 students will experience a \$100 bond cost increase.

The Department balances the additional bond cost to regulated programs against the benefit to students who will now be able to recover a higher proportion of the fees paid for services not yet delivered by a company that goes bankrupt. Some commenters oppose the increase and its method of calculation.

Criminal Background Checks

The Department proposes to eliminate a significant disparity between public and private programs in terms of the background checks that their instructors must undergo. Under current rules, public school teachers routinely undergo a thorough criminal background check including a review of the FBI's database. The criminal background check for instructors in for-profit and commercial programs has been limited to the Minnesota BCA database. The cost of the national background check would be borne by the instructor or program and costs about \$26.

Because instructors come from all states and countries, and spend time alone with a teenager in a vehicle, the Department feels that it is to the benefit of students to ensure that all instructors are given a thorough background check prior to employment.

(B) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Department does not anticipate that the rule amendments will have any significant impact on state revenues.^{[\[19\]](#)}

(C) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

Driver education for class D motor vehicle operation is mandatory for persons under the age of 18, for a motorcycle endorsement for a person under age 18, and for a motorized bicycle permit for a person who is at least age 15 and does not have a valid

driver's license. Thus, the issue of intrusiveness of the rules must be viewed in a context of mandatory instruction.

The introduction of on-line instruction for adults may provide a less costly alternative to the current rules by allowing programs to offer statewide on-line instruction for the classroom phase of motor vehicle instruction.

The existing rules mandate 40 hours of training to be a commercial class A, B, C, or D driving school instructor. The proposed rules provide a more flexible alternative by eliminating the 40-hour training minimum and proposing documented and demonstrated competency as an alternative. The 40-hour minimum in the current rules does not allow programs to adjust instructor training to address previous training, experience and competency.

The Department proposes to eliminate the requirement for dual brakes in motor vehicles used on a driving range because instructors are not normally present in a class D vehicle on a driving range.

(D) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The Department considered revision of the 30 classroom hours to six hours of behind-the-wheel instruction ratio for class D programs, but has not proposed any sweeping changes. The proposed rules allow for limited substitution of simulator time and/or range time for on-street time.

Some members of the rule advisory task force suggested that provisions relating to teleconferenced instruction be addressed solely through variance. The Department chose not to limit this form of instruction to a case-by-case variance because there was no evidence that allowing this form of instruction would be detrimental to the quality or availability of instruction. Teleconferenced instruction is limited to the classroom phase of driver education.

(E) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

In addition to the costs and benefits described above, some programs may need to develop a means of documenting and demonstrating instructor competency. Some programs may need to adjust their use of unqualified instructors on driving ranges, and their treatment of student in-car observation time as on-road experience.

(F) The probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by

identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

A cost and consequence of not adopting the proposed rules is that students, parents, programs and the general public will not know what the Department's standards, guidelines, policies and procedures are that are generally applied to driver education programs.

If the proposed rules were not adopted, the opportunity to develop simulated, range and on-line learning alternatives would continue to be prohibited, which would prevent students from accessing instruction in less costly and more convenient ways.

(G) An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need and reasonableness of each difference.

There are no federal regulations governing instruction and training for class D motor vehicle licensure, motorcycle endorsements, or motorized bicycle permit instruction.

Persons seeking a commercial vehicle driver's license to operate a class A, B, or C motor vehicle in interstate commerce must pass knowledge and skills tests that have been standardized throughout the United States and are administered by the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation. Criteria for tests for class A, B and C commercial motor vehicle licensure and various endorsements are specified in Title 49, Part 383 of the Code of Federal Regulations. The Department has adopted commercial license test standards in Minnesota Rules chapter 7410 that are consistent with the standards contained in 49 CFR 383.

The federal motor carrier laws and rules do not address specific CDL driver training curriculum, teaching materials or methods, or instructor qualifications for class A, B, or C motor vehicle education and training. Federal rules in these areas are under development. At this time, there is no federal mandate of hours of training for a person seeking CDL licensure prior to taking CDL tests.

15. The Department has satisfied the requirements of Minn. Stat. § 14.131 (2003), which requires it to ascertain the above information to the extent the Department can do so through reasonable effort.

Performance Based Rules

16. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems.^[20] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.^[21]

17. The Department identifies one of the objectives of the rule revision as streamlining the administrative procedures and policies applicable to all driver education programs – public, private and commercial – for all motor vehicle classes. Providing consistent and uniform procedures should provide more flexibility to the driver education system and allow for program administration efficiencies for the Department.

18. Proposed instruction options consisting of on-line instruction, computerized simulators, teleconferenced instruction and range driving provide flexibility to programs in reaching customers in outlying areas, meeting the needs of those with special learning or language requirements, and providing instruction around the customer's schedule.

Additional Notice

19. In addition to the mailed and published notice required by statute, the Department also mailed a copy of the notice and proposed rules to all appointed driver's license agents, state driver examination sites, and to all deputy registrar offices, accompanied by a request to post the information in areas accessible to the public.

20. The notice and rules were also mailed to all parties who expressed interest in the rules at the Request for Comments stage; all print and electronic news media in Minnesota; all county sheriffs; the Minnesota Chiefs of Police Association, all licensed commercial schools; and all DVS-approved public and private driver education programs. A copy of the notice, the proposed rules and the SONAR were also published on the Department's web page.

Rulemaking Legal Standards

21. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, in a rulemaking proceeding, the Administrative Law Judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.^[22] The Department prepared a Statement of Need and Reasonableness in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by exhibits and comments made by agency representatives at the public hearing and in written post-hearing submissions.

22. The question of whether a rule is reasonable focuses on whether it has a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.^[23] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.^[24] A rule is generally found to be reasonable if it is rationally related to the end sought by the governing statute.^[25]

23. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."^[26] An agency is entitled to make choices between possible approaches as long as the choice made is rational. It is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.^[27]

24. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.^[28]

25. In this matter, the Department has proposed some changes to the rule language after publication in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.^[29]

26. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced ... in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the ... notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

27. In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding ... could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the ... notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the ... notice of hearing."^[30]

28. Any substantive language that differs from the rule as published in the *State Register* has been assessed to determine whether the language is substantially different. Because some of the changes are not controversial, not all of the altered language has been discussed. Any change not discussed is found to be not substantially different from the rule as published in the *State Register*.

Analysis of the Proposed Rules

29. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. All of the public comments were fully considered. A detailed discussion of the proposed rules is unnecessary when the proposed rules are adequately supported by the SONAR or the Department's oral or written comments, and there is no public opposition. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

General Objections to the Rules

30. Some owners of commercial driving schools objected to many provisions of the proposed rules. For example, the Professional Driving Association of Northern Minnesota opposes all of the following rule parts, in part or in their entirety:

- 7411.0275 – Bond Based on Student Enrollment
- 7411.0340 – Program Annual Report
- 7411.0355 – Instruction Locations
- 7411.0525 – Simulation
- 7411.0530 – Teleconferenced Classroom Instruction
- 7411.0535 – On-line Classroom Instruction; Adults Only
- 7411.0540 – Homeschool Classroom Instruction
- 7411.0545 – Class D Program Laboratory Schedule; Hours
- 7411.0570 – Laboratory Range Instruction; Class D Range Driving
- 7411.0640 – Qualifications for Teleconferenced Classroom Instruction^[31]

31. To the extent that the Association or commercial program operators had specific objections, those objections are addressed in the section-by-section review, *infra*. In general, some of the commercial program operators believe that the proposed rules unfairly advantage public programs and will put some of the smaller commercial programs out of business. New technology and range driving may be expensive to develop, and many of the commercial programs lack the financial resources that the public school districts have.

32. The Department did include commercial program operators on its advisory committee, and has responded to the objections presented. It has balanced the objections against the development of new teaching techniques and greater access to technology, particularly simulators and teleconferenced classroom education, and has attempted to strike a balance between the conflicting concerns. It has also considered the burden of increasing required bonds and insurance with the benefit of better protection for students.

33. Not all commercial program operators oppose the new rules, and, in fact, some support many of the provisions. Some educators also enthusiastically support the new rules. Thus, one cannot conclude that the rules as a group are neither necessary

nor reasonable. Each of the rules about which there are concerns will be discussed individually, as well as the issues that were raised.

Discussion of Proposed Rules by Subpart

7411.0210, subpart 5

34. Jeanne Zetah, Eden Prairie Community Education Director, is concerned that this subpart is not clear about the status of a community education program that contracts with a commercial driver training school to provide training. The Department's proposed language adequately states that community education may contract with a commercial driving school. However, the Department should consider whether Ms. Zetah has identified potential areas where confusion could arise, particularly if the school district is providing the classroom, advertising the course options and enrolling the students, and the commercial driving school is providing the instructors, the vehicles and the course curriculum.

35. More clarity may be useful. Such clarification of this subpart would not make the rules substantially different from the rules as originally proposed.

7411.0210, subpart 6, item D

36. Robert Meyer, community education coordinator for Chisago Lakes public schools, and Dr. Brad Isberner, Associate Professor, St. Cloud State University, support the exemption from licensure for a driver education program operated by a postsecondary college or university, but do not support the limitation that such programs not provide instruction to persons under the age of 18. As Dr. Isberner points out, St. Cloud State University trains driving instructors, and its faculty is well-qualified to teach driver's education. He contends that if the postsecondary school is competent to train instructors, it is competent to train students.

37. The Department does not agree that it is appropriate to allow postsecondary schools to instruct students under the age of 18. It believes that the training must be provided by an instructor licensed by the Department, or a teacher with a valid driver education teaching certificate who meets other requirements of the rule. It does not believe that a postsecondary school must run its own driver education program in order to train its students.

38. In the SONAR, the Department relies on Minn. Stat. § 171.39, which exempts colleges and universities, both public and private, from licensure as a commercial driving school if instruction is part of the "normal program for those institutions." The instructor providing instruction at a college or university is also exempt from licensure as a commercial driver training school instructor. The Department maintains that providing Class D driver education to students under age 18 is not part of the "normal program" for postsecondary institutions and that the exemption should not extend to those students.^[32]

39. The record is not clear whether St. Cloud State University or any other postsecondary school is currently providing driver education to students under the age of 18. The Department is not aware that such a program is operating. The comments of Mr. Meyer and Dr. Isberner imply that there may be one. However, the exemption from licensure is not limited to those postsecondary schools that are training driver education instructors.

40. From the evidence presented in this proceeding, it appears that very few postsecondary schools train driver education instructors. The commenters have raised a point that the Department may wish to consider for those few schools. Because there is no clear evidence in the record that these programs are provided at postsecondary schools, the proposed limitation is necessary and reasonable.

7411.0210, subpart 7, item C

41. This provision requires a driver education program to file its schedule of fees and charges with the Department, and to send schedule changes to the Department before the changes take effect. Some commenters apparently believed that the Department would review and approve the fees and charges. In its comments filed on November 17, the Department clarified that it files the fees and charges, but does not approve them. This allows the Department to answer questions about fees, and to maintain some oversight over the programs in the event that there are questions about insurance or bonds.

42. The Department also proposes to require public programs to file their fees and charges, if they have them. This is a change from current rules that the Department asserts is necessary in order to properly oversee driver education programs. It does not explain what problems, if any, it has had because the information was not previously filed with it. Also, public programs are not required to file a bond. However, by collecting the information from all driver education programs the Department will have a clearer picture of the types of fees and charges assessed throughout the state, and be able to provide accurate information to the public. The Department has justified the need for and reasonableness of requiring information about fees and charges to be filed with the agency.

7411.0210, subpart 7, item E

43. Robert Meyer, Chisago Lakes community education, and Jeanne Zetah, coordinator of Eden Prairie's community education program, recommended that the rules require that an instructor's Board of Teaching license number be provided to the Department. In its comments submitted on November 17, the Department proposed to add this requirement for those driving instructors that have a Board of Teaching license. In its comments the Department clarifies that not all driver education instructors are required to have the Board's license. Thus, it proposes to modify this provision as follows:

- E. A program application must identify the instructors of students and provide each instructor's driver's license number. If an individual holding a Board of Teaching license will be providing instruction, the program must provide the teaching license number of that individual and identify any valid teaching and driver education instruction certificates the individual holds.

44. The new language assures that the Department can notify the Board of Teaching if problems arise with an instructor who is licensed by the Board of Teaching. This is consistent with the change proposed to Minn. R. 7411.1975 to clearly state that the Board of Teaching will be notified if the Department takes action against a program due to the action of an instructor with a license or certificate issued by the Board of Teaching. The Department does not have the authority to supervise teachers, but this provision will permit the Department to identify when a report to the Board may be appropriate. It also provides the Department with the information necessary to determine what type of training the instructor received. For these reasons, the amendment is necessary and reasonable. It does not constitute a substantial change.

7411.0210, subpart 7, item H

45. The Department's proposed rule states that a program application must specify if it will provide classroom instruction, laboratory instruction or both. The Range Driver Training School recommends that a driver education program be required to provide both classroom instruction and laboratory instruction. It maintains that this will assure that a student who receives classroom instruction will have access to behind-the-wheel training. It also fears that the Department's decision to allow classroom instruction by teleconference will lead to larger companies providing the more profitable classroom instruction and forcing the programs that provide laboratory training out of business. However, other commenters, including Kathleen Hron, owner of Right-Way Driving School, support the provision. Her school provides on-street laboratory instruction to students who receive the classroom portion of the training from the local school district.

46. The Department responds that some programs deliver one type of training and others deliver both types. This has not caused problems and allows for flexibility in the delivery of service. The Department does not believe that it is either necessary or reasonable to require driver education programs to deliver both classroom and laboratory instruction.^[33] The provision as proposed is necessary and reasonable.

7411.0270 Motor Vehicle Insurance

47. The Department has reorganized the provisions that require proof of insurance for motor vehicles used for driver education. It also clarifies that public, private and commercial driver education programs are required to submit proof of insurance.^[34] The Department's changes are also intended to clarify that the insurance

is for motor vehicles, and not for other property or general business coverage. The proposed rule is necessary and reasonable.

7411.0270, subpart 2

48. The Department has proposed to raise the coverage limits that the driver education programs must carry on their motor vehicles. The current limits have been in effect for over 20 years. The Department made this change after consulting with insurance agents and surveying some driver education programs. Its proposal is consistent with the limits recommended in the Traffic Safety Education Life Long Learning Process, Recommendations on the Delivery of Driver Education Draft, prepared by the Highway Safety Center of Indiana University of Pennsylvania, used by many public driver education programs.^[35]

49. Although there were no objections to the increased limits *per se*, Bob Schnell, agent for Casualty Insurance, spoke at the hearing at the request of Mark and Debra Prudhomme of Training Wheels Driver Education, and the Association of Professional Driving Instructors of Minnesota (APDIM). He recommended an alternative, that a flat \$300,000 amount be adopted, rather than separate limits for personal injury, property damage and medical expenses, as set forth in the proposed rule. It was Mr. Schnell's opinion that this would provide adequate coverage and help keep down premiums for the commercial driving schools.

50. The Department does not believe that \$300,000 is adequate coverage. It bases its position on information collected from the insurance industry, and Minn. Stat. § 65B.49, which specifically lists separate minimum amounts of liability coverage rather than one flat amount. For these reasons, the Department does not support a change to permit a flat rate.^[36] The Department has demonstrated the need for and reasonableness of its proposed limits.

7411.0275, subpart 2

51. The Department's proposal to raise the level of bond required for commercial driver education programs generated opposition at the public hearing and in the written comments. The Department proposes to set the level of the bond based on the "total number of students enrolled in the program the previous calendar year." In the SONAR, the Department explains that the current bond limit of \$10,000 is inadequate to cover the money lost by students when a large driving school goes out of business. The \$10,000 level was established nearly 40 years ago. In particular, the Department wants to prevent a new company from opening, charging fees, and closing without delivering driver education to the students. Some driver education companies have gone bankrupt or closed in recent years without refunding student fees. The Department wants to better protect the students, and recognizes that it is not practical for students to initiate individual civil actions to recover the relatively small amount of money paid for driver education. The Department estimates that large commercial driver education schools may generate over \$900,000 annually, and based on the

assumption that training is usually provided over three months, that the company may have collected up to \$250,000 from students who have not completed training.^[37]

52. Several commercial driving schools opposed the Department's proposal. First, several asserted that it was inappropriate to tie the bond level to the annual enrollment because it significantly overstated the number of students who had paid but not completed training at one time. For example, Anthony Lewis, Midway Driving School, reported that he does not hold more than \$10,000 for services yet to be provided. William S. Collins, Interstate Driving Academy, reports that he never has more than \$15,000 for services yet to be provided, and will have receivables that exceed that amount. The Department recognized that no more than one quarter of the driving school's students would have paid and not received service, but chose to retain the annual basis of calculation, both to maximize the money available to pay back students, and because of the ease of verifying the proper figure.

53. Second, the commenters opposed the new limits because several were unsure that they would be able to find a company willing to provide a higher bond. Many commercial driving schools do not have significant property or assets to provide the necessary collateral for the proposed bond. They did not oppose the increased cost of the bond *per se*, but fear that they would not qualify for the higher bonds. One commercial driving school, Cindy and Jim Thienes, owners of Safeway Driving School, supported the bond increase.

54. The SONAR explains that the Department considered other options, including some that would have required auditing of the school's records.^[38] Those options were opposed by some members of the rule advisory committee, including Debra and Mark Prudhomme, Training Wheels Driver Education, and Mardi Lacher, owner of Go Driving School and president of the Association of Professional Driving Instructors of Minnesota.^[39]

55. Mr. William S. Collins, Interstate Driving Academy, submitted a lengthy letter dated November 24, 2003, further explaining the problem he sees with businesses obtaining the higher bonds proposed by the Department. He is concerned that otherwise successful driver education programs will be forced out of business because of insufficient assets to support the higher bonds. In addition, he offers an alternative, similar to the current statute regulating health clubs.^[40]

56. The Department has demonstrated the need for and reasonableness of increasing the bond limits. It has also shown that its choice of annual enrollment as a measure was well-considered. However, the strong opposition voiced by many driving schools, and the lack of good information about available collateral for larger bonds, is troubling. The Department may wish to reconsider using annual enrollment to determine the amount of bond in light of this strong opposition, and the evidence that some driving schools do not have large amounts of money collected in advance of delivering service. Although in the aggregate, some driving schools collect a lot of money, it is significant that the risk of loss to any one student, although not inconsequential, is not large. It would not make sense to put a commercial driving

school out of business because it lacks the collateral for a higher bond, if the bond exceeds the amount of funds at risk. Modification of this provision in response to the public comments would not constitute a substantial change.

7411.0280 Program Records

57. In response to comments received prior to the hearing, the Department proposed a clarification between a “certificate” issued at the completion of a required course, and a “document” that specifies the portion of a course that was completed. This improves the clarity of the provision and is not a substantial change.

7411.0295 Advertising Restrictions

58. In response to comments received prior to the hearing, the Department modified its requirement that the address used in advertising must be the licensed location. The change clarifies that this applies to the location of instruction and not to an address used for administrative purposes. The modification is consistent with the stated purpose of the advertising restriction and is not a substantial change.

7411.0305 Student Agreements or Contracts

59. In response to comments received prior to the hearing, the Department modified Item G. As proposed, the provision required the beginning and ending dates for program completion. To be more clear, it was modified to require the start and completion of instruction by the student. This is not a substantial change.

7411.0335 Withholding Certificate of Course Completion

60. Mary Ann Madden, Range Driver Training, expressed concern that a certificate could not be withheld from a student who failed to attend classes covering all of the required areas of instruction. The Department did not choose to make a change in response to this comment. All students are expected to learn the course material and are tested on the course contents. Apparently the Department did not believe that any restrictions on student attendance were necessary.

7411.0340 Program Annual Report

61. In response to a comment from Mary Ann Madden, Range Driver Training, the Department modified the language of this provision so that the annual report includes information consistent with the bond requirements of the rule, Minn. R. 7411.0275, subp. 2. That proposed rule ties the bond amount to the number of students enrolled in a calendar year. The change to this section clarifies that the driver education program’s annual report must include the number of students enrolled in the program during the calendar year. This is not a substantial change.

7411.0365 Situations Requiring Notification

62. Item D requires notice to the commissioner “within ten days” if a student is involved in a motor vehicle accident while receiving laboratory instruction. Item E requires notice “within five days” if an instructor has violated a statute or rule or committed an act that would cause the instructor to be unfit to continue to work as an instructor. Item F requires notice “within five days” of the death, retirement, resignation, or discontinuance of employment or service of an instructor. Although not stated, it is implied that these references are to calendar days. However, item B of this part refers to “three business days,” and item C of this part refers to “ten calendar days.” Thus, although the rule as written is not defective, to be consistent and clear, the Department should consider specifying whether Items D, E and F refer to business days or calendar days. This would not constitute a substantial change.

63. Also, Item F states that notice must be given “in writing.” Although not a defect, this is redundant because of the introductory sentence to this rule part. It states that the commissioner must be given notice “in writing” of each of the reportable events. Deleting the same words in Item F would not constitute a substantial change.

7411.0515, subpart 3, item F

64. The Professional Driving Association of Northern Minnesota was concerned that the laboratory curriculum requires “freeway driving.” The Department responded that this is a current requirement, and that it will consider a request for a variance under certain circumstances, according to the process set forth in Minn. Stat. §§ 14.055 and 14.056.

7411.0525 Simulation Instruction

65. Some of the commercial driving schools objected to the Department’s proposal to allow simulation instruction as a substitute for a portion of the on-the-road laboratory instruction.^[41] However other instructors, including those with experience in programs with simulators and without simulators, enthusiastically supported simulator training.^[42] Fred Schreiber did not object to simulation instruction *per se*, but he believes that it should be treated as classroom instruction and not laboratory instruction. Others objected to the proposed ratio of substitution – four hours in the simulator as a substitute for one hour of on-the-road laboratory instruction, up to a maximum of two hours. The Department responded that simulation instruction is allowed under the current rules, with the four-hour to one-hour ratio. However, it is proposing to allow only two hours of substitution for on-the-road instruction, rather than the three hours allowed under the current rules.

66. The Department has fully considered the comments received. It has clarified that simulation instruction may be taken before the student obtains a permit and still count as laboratory time. It points to 7411.0545, item A, which states that a permit is needed only when the student is operating a motor vehicle. A simulator is not a motor vehicle.^[43]

67. The Department's decision to allow only two hours of on-the-road time to be exchanged for simulator time reflects the pressure to increase the number of hours students spend on the road prior to obtaining their license. Although the Department considered raising the total number of laboratory hours and chose not to do so, it did reasonably conclude that four hours was the minimum that a student should spend driving on public roads prior to testing for the driver's license.^[44]

7411.0530 Teleconferenced Instruction

68. Current rules require the physical presence of a licensed or approved instructor in the classroom during instruction. The Department states that this has been a stumbling block to delivering classroom instruction in greater Minnesota. Some school districts attempted to institute teleconference instruction, but the Department notified them that it was not permissible under the current rules. With the increased availability of teleconference technology, the proposed rules allow its use so long as certain conditions are met. Some school districts have requested the opportunity to deliver service in this way because of its success in other subject areas.^[45]

69. Some of the commercial drivers education programs challenged the Department's representation that driver education is not widely available in greater Minnesota. The Professional Driving Association of Greater Minnesota states that its members have not been approached to provide more extensive training opportunities. The association is concerned that taxpayer dollars will be used to develop teleconferencing through the public schools and place commercial driver education programs at a competitive disadvantage. In addition, the Association questions the wisdom of instructing novice drivers without an instructor on site to answer questions, and insure that shy class members receive necessary attention. Jim and Cindy Thienes, Safeway Driving School, generally support the Department's proposed rule changes, but they do not support teleconferenced instruction. Their experience is that direct interaction is necessary in order to serve students under age 18 well.

70. Joseph Christensen and Dr. Brad Isberner support the use of teleconferenced instruction. They do not foresee the problems that some of the commercial programs foresee. Mr. Christensen has had some experience with teleconferenced instruction of other subjects, and believes that the technology is suitable for the classroom portion of driver education.

71. The Department has demonstrated that it has considered the merits and possible disadvantages of teleconferenced instruction. It has placed limitations on its use to assure that the students are viewing from a classroom and that they are in direct picture and sound communication with the instructor. An adult monitor must be present. In response to some of the concerns raised, the Department proposed modifying Item C to clarify that the adult monitor must be present in the classroom during teleconferenced instruction. Identical written curriculum materials must be available in the teleconference site. The Department also notes that access to teleconferencing facilities is not limited to the public schools.

72. The Department has justified the need for and reasonableness of the rule that allows teleconferenced instruction. As the Department points out, use of this technology is increasingly common. It may help reduce costs and may increase students' access to driver education. The proposed modification clarifies the monitoring of the students and is not a substantial change.

7411.0535 On-Line Classroom Instruction; Adult Only

73. The Department considered allowing on-line classroom instruction, and this was discussed with its advisory committee. The consensus was that students under age 18 need the structure and interaction provided by attending class. There may be some instances where on-line instruction would be helpful, particularly for students with certain mental or physical disabilities. However, the Department relies on the current statutory language that requires "classroom" instruction for individuals under age 18. For this reason, it has proposed allowing on-line instruction for adults only. It believes that on-line instruction has the potential to make the best instructors and best teaching materials widely available statewide, and allows for quick updating of materials. The Minnesota knowledge test is given in six languages. On-line instruction could be developed in several languages as well. On-line instruction is also available at times convenient to the adult learner.

74. The proposal places some limitation on on-line instruction for adults. At this time, nothing prevents this form of instruction for adults, either in statute or rule. Under the proposed rules, there is no requirement that a driving school offer on-line education to adults, but it assures that if a school should choose to do so, certain conditions are met.

75. This change prompted some comments about why the Department is attempting to regulate this method of adult driver education when it does not set standards for other forms of adult driver education.^[46] The Department responds that it has the authority to regulate the instruction of adult consumers of driver education through a number of different statutes, many of which prescribe certain content for instruction. The Department regulates commercial driving schools regardless of the age of the person receiving the instruction.^[47] People of all ages may be required to take driver education for a number of reasons, and certain types of instruction must be provided to these students regardless of the type of program in which the student is taught.^[48] Thus, the Department is charged with ensuring the inclusion of certain mandatory course content in all driver education programs.

76. The Department's proposal to regulate on-line instruction of adults is a departure from its past practice in this area, but it is not inconsistent with the Department's statutory authority to prescribe the course content in driver education programs that serve adults. The Department has articulated a need for this type of instruction for adults, particularly for immigrant populations. The proposed rule is needed and reasonable.

7411.0540 Homeschool Classroom Instruction

77. The Department has proposed this part in response to legislation enacted in 1999 that allows homeschool students to complete their classroom driver education for a Class D license at home, under the supervision of the student's parent or guardian. The Department's proposed standards are necessary and reasonable.

7411.0545 Laboratory Instruction

78. In response to a question from Jeanne Zetah, Eden Prairie Community Education, and others prior to and at the hearing, the Department proposes to modify subpart A to clarify that any person who operates a motor vehicle must pass the Minnesota knowledge test for the class of vehicle in which instruction is being given, in addition to holding a Minnesota instruction permit, Minnesota driver's license, or a permit or driver's license from another state or country. As modified, subpart A states:

- A. An instructor shall ensure that any student operating a motor vehicle has passed the Minnesota knowledge test representative of the class of vehicle in which instruction is to be given and is in possession of either a valid:
 - (1) Minnesota instruction permit
 - (2) Minnesota driver's license
 - (3) permit or driver's license from another state or country.

79. The Department's intent is to insure that any person receiving driving instruction on the public roads is familiar with Minnesota traffic laws and regulations.^[49] The proposed modifications clarify this intent. It is not a substantial change.

80. There is nothing in the rules as proposed that requires an instructor to be present in the vehicle when on-street instruction is provided to a student without a valid driver's license. By statute, there must be an adult licensed driver in the seat beside the student driver.^[50] Although it may be implicit that the adult must be an instructor, it is not clearly stated. It would be helpful to clarify in the rules that an adult instructor must be in the seat beside the student driver during on-street instruction through a public, private or commercial program.

7411.0555 Class D Program Laboratory Schedule; Hours

81. In this subpart, the Department clarifies when range driving and simulation instruction can be counted toward the minimum required six hours of laboratory instruction. Two hours of range instruction may be substituted for one hour of on-street instruction, but on-street time must not be less than four hours of the required six hours. Also, if the student has received at least eight hours of simulator instruction and at least two hours of range instruction, the student's on-street time must not be less than three hours of the required six hours.

82. Mark Prudhomme, Training Wheels Driver Education, disagrees with the proposed substitution of simulator and range driving for on-street driving. He does not

think that there is an adequate substitute for a full six hours of on-street driving. Other commenters disagreed, and believe that simulation and range driving can improve a student's exposure to a variety of driving conditions, allow more time to practice certain types of maneuvers, and give students who have no driving experience the opportunity to practice and gain self-confidence in a controlled setting.^[51] Dr. Brad Isberner, Associate Professor, St. Cloud State University, offered that research supports the combination of simulator and range training with classroom and on-street driving, and he supports the Department's proposal to allow some limited substitution of laboratory hours.^[52]

83. Terry C. Suneson, Driver Education Coordinator for South Washington County Schools, has been teaching driver education for 30 years and uses classroom, simulation, driving range, and on-the-road instruction. He is an advocate for range driving, and submitted letters from several of his students who believe that practice on the driving range increased their confidence and allowed them to repeat certain maneuvers several times.^[53]

84. The Department contends that range instruction and simulator instruction, combined with classroom and on-the-road instruction, are good training techniques when properly incorporated into the curriculum. It has demonstrated the need for and reasonableness of permitting some substitution of simulator and range instruction for on-street time.

7411.0570 Laboratory Range Instruction

85. The Department proposes adding requirements for driving range instruction. In the past, the rules addressed only motorcycle ranges. A driving range is a designated, off-road area where students are able to practice driving a motor vehicle. Under the proposed rule, a driving range must meet certain location and size requirements, and the instructor must be able to communicate with each separate motor vehicle operating on the range. The rule also sets ratios for the number of students per instructor that may be on the range at one time.

86. Mike Polanski, One-Way Driving School, objects to the 12:1 ratio for students to instructor. Based on his experience with student drivers, he believes that a 4:1 ratio is more appropriate. He states that the Saint Paul Public Schools have employed the 4:1 ratio successfully, and would have increased the ratio if it were safe to do so. He is also concerned that Eagan School District may be using students to assist with instruction.

87. Mr. Polanski submitted a videotape^[54] of an hour of range driving at an Eagan High School range. Mr. Polanski describes the footage on the videotape as a typical range driving session and points to a number of incidents on the tape that he sees as evidence that the proposed ratio of students to instructor is too high.^[55] His primary objections are that teenagers may be instructing other teenagers as they drive through the course, and that the adult instructor appears to paying attention to things

other than the teens in the cars. The Administrative Law Judge has viewed the tape and paid particular attention to those issues raised by Mr. Polanski.

88. The proposed rule requires a qualified instructor, as defined in proposed 7411.0620 to 7411.0690, for every twelve students. A qualified instructor must be at least 21 years old, and must have received instructor training. The Administrative Law Judge did not see anything on the videotape that indicates that such a ratio, or other features of range driving, are detrimental to student safety.

89. The Department has considered the objections, as well as the support for the range driving requirements, and believes that its proposed rule will adequately protect student drivers. There were no objections to the proposed rule from programs currently providing range driving. The Department has demonstrated the need for and reasonableness of the proposed rule.

7411.0620, subpart 2, item B

90. Kathleen Hron, Right-Way Driving School, the Association for Professional Driving Instruction in Minnesota, and the Professional Driving Association of Northern Minnesota raised a question about providing a certified copy of the instructor's driving record with the renewal application. Every initial applicant must provide a certified copy (subpart 2, item A), but only instructors without a Minnesota driver's license are required to submit a certified copy each year at the time of the renewal (subpart 2, item B). The Department explained that it is able to check the driving record of instructors holding a Minnesota driver's license, but does not have access to that information for instructors who are licensed by another state. This requirement is in the current rule (Minn. R. 7411.0610, subpart 3, item C).^[56] The Department is not required to demonstrate the need for and reasonableness of a provision that is already in the current rule.

7411.0620, subpart 8

91. Debra Prudhomme, Training Wheels Driver Education, objected to requiring a federal criminal background check, particularly for persons who have lived in Minnesota for five years or more. Cindy and Jim Thienes, Safeway Driving School, support the requirement but estimate that it will add an additional \$364 to their overhead. The Department maintains that residence is not determinative of where a crime may have been committed, and that the background check is a necessary precaution for persons providing instruction to children, particularly when instruction may be given one-on-one in an automobile. Also, the Board of Teaching requires the federal background check, so the extension of the requirement to commercial driving instructors is consistent. The Department also notes that the requirement applies to first-time instructors; the federal background check is not required at renewal. The cost for the Federal Bureau of Investigation to run a fingerprint check is \$26. The Department believes that this is a nominal, one-time expense for new instructors, and is warranted to protect student safety. The Department has demonstrated the need for and reasonableness of requiring a federal background check.

7411.0630 Instructor Training Qualifications

92. Dr. Brad Isberner, Saint Cloud State University, recommends that all instructors complete a minimum of two college-level courses. The Department acknowledges the value of the recommended training, but declines to require the courses for driving instructors. Saint Cloud State University is the only postsecondary school in the area that offers the courses, space is limited, not all driving instructors may have the necessary educational background for the courses, and the classes are costly.^[57] Dr. Isberner does not point to any particular instances where lack of the college-level courses has resulted in a pattern of poor driving instruction. Many commercial driving schools prefer to train their own instructors.

93. The Department received comments prior to the hearing that its rule was not entirely clear that a person holding a Board of Teaching license with certification for drivers education did not need to separately document and demonstrate the competencies set forth in the rule for an instructor in a class D program. In response to these comments, the Department proposed an amendment at hearing to clearly state its position. It proposed adding subpart 4a.

Subp. 4a. Instructor with Board of Teaching credential. An individual with a Board of Teaching license and certification under rule part 8710.4350 (2003) meets the requirements in subparts 3 and 4.

94. As the Department points out, it fully accepts the licensing and certification done by the Board of Teaching, and does not intend to specify training requirements applicable to licensed teachers. Thus, the amendment proposed at hearing is necessary to avoid any confusion between the Department's rules and those developed and enforced by the Board of Teaching. The amendment proposed at hearing is consistent with the laws that apply to teachers, and is not a substantial change.

95. In response to additional comments, the Department has proposed a subsequent amendment to subpart 4a, adding: and the initial testing and evaluation requirements in part 7411.0650.

96. The Department has determined that the testing and evaluation done by Saint Cloud State University is comparable to the tests and evaluation done by the Commissioner.^[58] Thus, once the rules are in place, the Department intends to enter into a memorandum of understanding with Saint Cloud State University so that it is clear that the program meets the Department's standards.

97. The proposed modification is not entirely consistent with the Department's stated intent. By modifying subpart 4a, the Department will not require any testing or evaluation for an instructor who has a Board of Teaching license and certification, regardless of where or how the person earned them. One cannot assume that all such individuals were or will be trained at Saint Cloud State University, even if it is the only program operating in Minnesota at this time. If the Department believes that some memorandum of understanding is required so that it is clear that Saint Cloud State

University is in effect administering the testing and evaluation required in part 7411.0650 on behalf of the commissioner, then the proposed modification is not consistent and is not reasonable. The Department must clarify its intent in order to justify the modification.

7411.0630, subpart 5, item B, subitem (7)

98. William S. Collins, Interstate Driving Academy, took strong exception to the Department's proposal to require 6,240 hours of experience operating the class A, B or C vehicle for which instruction is provided, within the prior five years. The Department fully considered the information provided by Mr. Collins and checked the requirements in some other states. It concluded that 3000 hours within the prior three years was sufficient experience with the vehicles, and proposed an amendment:

(7) experience, by a showing of ~~6,240~~ 3,000 hours within the last five three years of experience operating the class of vehicle for which instruction will be provided.^[59]

99. By letter dated November 24, 2003, Mr. Collins expressed his support for the modification. He believes that the proposed change is consistent with the level of experience that the trucking industry considers sufficient to qualify as an experienced driver. This item was included in the proposed rule, and the change was made in response to public comment. It is the type of change that could have been reasonably contemplated. It is not a substantial change. The provision, as modified, is necessary and reasonable.

7411.0850, subpart 2

100. Prior to the hearing, the Department received comments that the proposed rule would require annual inspections for all vehicles, regardless of age. The Department offered an amendment at hearing to clarify that an annual inspection would be required only for class D vehicles over six years of age. Its purpose is to allow continued use of older vehicles, so long as the vehicle is safe.^[60] The Department's proposed amendment clarifies its initial intent and is not a substantial change.

7411.0850, subpart 3

101. Prior to the hearing, the Department received a comment from Dr. Brad Isberner, Saint Cloud State University, that a visor mirror is not adequate for an instructor to watch behind the vehicle, and should be deleted from this subpart. He stated that research has shown that instructor and student driver lines of sight are hampered by the instructor's use of a visor mirror. The Department agrees that make-up mirrors, frequently installed on the passenger visor, are not an appropriate rearview mirror for the instructor to use. At the hearing, it proposed an amendment to clarify what constitutes acceptable equipment:

Subpart 3. Equipment required on vehicles. A class A, B, C or D vehicle used for driver education instruction must have an outside rearview mirror on each side of the vehicle, a separate inside rearview or visor mirror for the instructor's use, and seat belts for each occupant of the vehicle as required by state law...

102. This change is necessary to assure that make-up mirrors are not used inappropriately as a rearview mirror. It is not a substantial change.

7411.0850, subpart 13

103. The Professional Driving Association of Northern Minnesota was concerned with the provision requiring an instructor to accompany a student to the road test if the student was going to use the driving school's vehicle for the test. It did not understand either the need for or reasonableness of that provision, since any licensed driver could drive the car to the test site. The Department agreed that an instructor was necessary only if the student was going to drive the vehicle to the test site. In its comments, it proposed modifying this subpart:

Subp. 13. Use of program vehicle for student road or skills test. An instructor must accompany an applicant appearing for the state driver's license road test when a program's vehicle is to be used and the applicant is driving the vehicle. The instructor must be employed by the program that owns or leases the vehicle. An employee of the program that owns or leases the vehicle may accompany the applicant if the applicant is not driving the vehicle.

104. This modification is still confusing. There are two concepts: who can take the car to the test site, and who must accompany a student to the test site. The Department has not explained why there should be any restriction on who takes the vehicle to the test site if the student is not in it. Any licensed driver approved by the driving school could take the car to the site. Second, what are the appropriate restrictions if the student is in the vehicle? It is logical that a student should not drive to the test site in the program's vehicle without an instructor, and it would be appropriate to state that. See also the discussion of 7411.0545, concerning lack of a clear statement that an instructor must be in the vehicle with a student who is driving during laboratory on-street instruction. But it is not clear who can drive the student to the exam in the program's vehicle. If there are limitations on who can drive the student, the Department must explain its rationale for them. As proposed, with or without the modification, the subpart is neither necessary nor reasonable, and constitutes a defect in the rules.

7411.1800, subpart 1, item F

105. The Department has set forth several bases for discipline of licensed programs. Most are clear and the need for and reasonableness of them has been demonstrated. However, item F allows discipline for the following:

The program or an instructor has conducted business in a way that substantially departs from commonly accepted practices as used by other driver education programs and instructors.

106. The Department's SONAR states that this is a renumbering of current rule 7411.0800, subpart 8, item G. As such, the Department is not required to reestablish its need or reasonableness. However, some deviations from commonly accepted practices may improve the training provided, even if uncommon in the industry. For example, a program may market a program using simulation, a sophisticated driving range and on-the-road time, for a greater number of hours of training, geared to develop greater skill, at a higher price. Even though the business might deviate from the commonly accepted practices of other programs, it would not be to the detriment of the student.

107. If a program otherwise comports with the Department's rules and neither diminishes the quality of the instruction, nor adversely affects the student's safety, it is difficult to understand the basis for discipline. The provision could be improved by linking the requirement to the student's education or safety. For example, one could add "that adversely affects the student's education or safety and" after "in a way." This change would also make the provision less vague. Such a change would not be substantial.

7411.1975 Board of Teaching Referral

108. Concerns were raised prior to the hearing that this rule, as originally drafted, might imply that the commissioner of public safety would interfere with teacher supervision. The Department acknowledges that it does not directly supervise persons licensed by the Board of Teaching, and proposed a modification at the hearing to more clearly explain the commissioner's role in notifying the Board of Teaching when disqualifying events occur. As modified it reads:

If the commissioner takes administrative action against an instructor
a program with a Minnesota Board of Teaching license or certificate
of an approved public program due to action of an instructor with the
approved program a license or certificate issued by the Board of
Teaching, the commissioner shall notify the Board of Teaching so
appropriate action may be taken by the board.

109. The rule as modified is necessary and reasonable and the modification is not a substantial change.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted in Findings of Fact Nos. 97 and 104.

5. The modifications to the proposed rules that were offered by the Department after publication in the State Register do not result in rules that are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. Due to Conclusion No. 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 4.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted, except where specifically otherwise noted above.

Dated this 24th Day of December 2003.

Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: No transcript (5 tapes).

NOTICE

The Department must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100, and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions that will correct the defects. If the Department elects to make any changes to the rule, it must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, if the Department does not elect to follow the suggested actions, it must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Department must give notice to all persons who requested that they be informed of the filing.

^[1] Minn. Stat. §§ 14.131 through 14.20 (2003).

^[2] Ex. 2.

^[3] Ex. 2.

^[4] Ex. 11.

^[5] Ex. 13.

^[6] SONAR at 11.

^[7] SONAR at 11-12.

^[8] Ex. 17.

^[9] Ex. 18.

^[10] SONAR at 12-13.

^[11] SONAR at 12.

^[12] Ex. 21.

^[13] Ex. 59.

^[14] The complete list of statutes on which the Department relies for authority for this rulemaking, as well as excerpts from, or a summary of, each of the statutes is provided in the SONAR at pages 2-4.

^[15] Minn. Stat. § 14.131 (2003).

^[16] SONAR at 15.

^[17] SONAR at 16-17.

^[18] Department Response to Comments, November 21, 2003, at 4-5.

[19] SONAR at 17.

[20] Minn. Stat. § 14.131.

[21] Minn. Stat. § 14.002.

[22] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[23] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

[24] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

[25] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[26] *Manufactured Housing Institute*, 347 N.W.2d at 244.

[27] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233, 63 S. Ct. 589, 598 (1943).

[28] Minn. R. 1400.2100.

[29] Minn. Stat. § 14.15, subd. 3.

[30] Minn. Stat. § 14.05, subd. 2.

[31] Ex. 37.

[32] SONAR at 29.

[33] Department Comments, November 17, 2003, at 3-4.

[34] SONAR at 33-34.

[35] SONAR, at 34.

[36] Department Comments, November 17, 2003, at 5-6.

[37] SONAR at 34-36.

[38] SONAR at 36-38.

[39] Department Comments, November 17, 2003, at 6-7.

[40] Minn. Stat. § 325G.27 (2002).

[41] Range Driver Training, November 14, 2003.

[42] See, e.g., Comments for Douglas Riles, rec'd November 17, 2003;

[43] Department Comments, November 17, 2003, at 9-11.

[44] Department Response to Comments, November 21, 2003, at 2-3.

[45] Department Comments, November 17, 2003, at 11.

[46] Debra Prudhomme, Mark Prudhomme, comments at hearing on October 28, 2003.

[47] See Minn. Stat. § 171.34.

[48] See, e.g., Minn. Stat. §§ 169.26 (railroad grade crossing), and 169.446 (safety of school children). The most recent authority granted to the Department for the regulation of the content of driver education programs, regardless of the age of the student, is Minn. Stat. § 171.0701 (providing that the “commissioner shall adopt rules requiring instruction relating to organ and tissue donations and the provisions of section [171.07](#), subdivision 5, for persons enrolled in driver education programs offered at public schools, private schools, and commercial driver training schools”).

[49] Ex. 35; Department Comments, November 17, 2003, at 13-14.

[50] Minn. Stat. § 171.05, subd. 1.

[51] Donald Proath, November 16, 2003; Douglas Riles, undated, received November 17, 2003; Joseph Christensen, undated, received October 29, 2003; Kurt Virgin, Eagan High School, undated, received November 17, 2003.

[52] Dr. Brad Isberner, October 28, 2003.

[53] Terry C. Suneson, November 15, 2003, with enclosures.

[54] Ex. 73.

[55] See Ex. 82.

[56] Department Comments, November 17, 2003, at 16.

[57] Department Comments, November 17, 2003, at 17.

[58] See also Comments from Dr. Brad Isberner, October 29, 2003.

[59] Department Comments, November 17, 2003, at 19-21.

[60] Ex. 35.